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NO. _____

Supreme Court of the United States

October Term 1980

DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION OF AMERICA, LOCAL UNION 38, AFL-CIO
- Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD
- Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in finding that substantial evidence in the record supports the National Labor Relations Board's decision that the Distillery, Rectifying, Wine and Allied Workers Union of America, Local Union 38, AFL-CIO, failed to give clear and unambiguous notice to the Charging Parties of the consequences of their continued deliquency in the payment of union membership dues?

2. May the Charging Parties use the fiduciary responsibilities of their union as a shield against the lawful consequences of their purposeful avoidance of their obligation to pay union membership dues?

LIST OF ALL PARTIES

All parties to the proceeding in the Court of Appeals are listed in the caption of the case in this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF ALL PARTIES	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS WHY THE WRIT SHOULD BE GRANTED	8
1. This Case Presents A Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court	8
A. A Union's Fiduciary Duties	8
B. The Union Fulfilled Its Fiduciary Duties to Hall and Bahar	13
2. The Board Has Departed From Established Precedent In Permitting Hall and Bahar To Purposefully Avoid Their Legitimate Dues Obligations	23
3. The Duties Imposed Upon the Union By The Board's Decision Are Unduly Burdensome	26

CONCLUSION 27

APPENDIX:

1. Order of the United States Court of Appeals for the Sixth Circuit dated February 16, 1981 ..... 1a

2. Decision and Order of the National Labor Relations Board dated May 18, 1979 ..... 3a

TABLE OF AUTHORITIES

Page

Cases:

Bay Area Typographical Union (Northwest Publications, Inc.), 218 NLRB 812 (1975) 20

Conductron Corporation, 183 NLRB 419 (1970) .. 21

H. C. McCauley Foundry Co. v. NLRB, 553 F.2d 1198 (9th Cir. 1977) 10

Industrial Union of Operating Engineers, Local 545, 161 NLRB 1114 (1966) 22

International Union of Electrical, Radio and Machine Workers v. National Labor Relations Board, 307 F.2d 697 (D.C. Cir. 1962) 8

John J. Roche & Co., 231 NLRB 1082 (1977) 17,24

Larkins v. NLRB, 596 F.2d 240 (7th Cir. 1979) . . . 17

National Labor Relations Board v. Construction and Building Material Teamsters, Local 291, 633 F.2d 1295 (9th Cir. 1980) 11,14,23,26

NLRB v. Hotel, Motel and Club Employees' Union, Local 568, 320 F.2d 254 (3rd Cir. 1963) 9,14,23,26

NLRB v. Teamsters, Local 182, 401 F.2d 509 (2nd Cir. 1968) 10

Teamsters, Local 162 v. NLRB, 568 F.2d 665 (9th Cir. 1978) 11

Teamsters, Local 122, 203 NLRB 1041 (1973) 19

Teamsters, Local 630 (Ralph's Grocery Company), 209 NLRB 117 (1974) 24

United Auto Workers, Local 17 (Kuhlman Electric Company), 210 NLRB 798 (1974) 18

United Brotherhood of Carpenters (Alcoa Construction Systems, Inc.), 224 NLRB 1034 (1976) 15

Statutes:

28 USC §1254(1) 2

29 USC §158(b)(1)(A) 2,7

29 USC § 158(b)(2) 2,7,25

29 USC §160(e) 2,7

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Distillery, Rectifying, Wine and Allied Workers International Union of America, Local Union 38, AFL-CIO, hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on February 16, 1981.

OPINIONS BELOW

The decision rendered by the Court of Appeals is not yet reported either officially or unofficially. A copy of the decision is incorporated into the Appendix at page 1a.

The Decision and Order entered in this case by the National Labor Relations Board is reported at 242 NLRB No. 51 and 101 LRRM 1150 (1979). A copy of that Decision and Order is incorporated into the Appendix at page 3a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1981. The jurisdiction of this Court is invoked under the provisions of 28 USC §1254(1) and 29 USC §160(e).

STATUTES INVOLVED

1. 29 USC §158(b)(1)(A) provides as follows:

   "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in Section 157 of this title: **Provided**, that this paragraph shall not impair the right of a labor oganization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ."

2. 29 USC §158(b)(2) provides as follows:

   "It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to

tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ."

STATEMENT OF THE CASE

Pursuant to the terms of the collective bargaining agreement executed on August 1, 1973, by the Distillery, Rectifying, Wine and Allied Workers International Union of America, Local Union 38, AFL-CIO ("the Union") and Schenley Distillers, Inc. ("the Company"), the Union is recognized as the exclusive bargaining representative of most of the Company's employees. Article II of the agreement requires each of the Company's bargaining unit employees to "be and remain members of the Union in good standing . . . as a condition of employment . . . ." That Article also provides that "all employees . . . shall be required to pay . . periodic dues and regularly authorized assessments established by the Union as a condition of good standing membership." Finally, Article II provides that "the Company shall be required to discharge any employee upon notification of the Union to the effect that said employee is not in good standing . . . ." All employees, including the Charging Parties, Grant Hall and Morgan Bahar, receive a copy of the collective bargaining agreement and a copy of the Union's constitution and by-laws upon initiation of their Union membership.

The Union's constitution and by-laws require Union members to pay membership dues in the amount of $8.00 per month, except when the member is laid off. While on layoff, a Union member is given the choice of paying dues in the amount of $4.00 per month or obtaining an "out-of-work card" from the Union. The card suspends the member's dues obligation during the period of layoff.

The constitution and by-laws specify that a Union member ceases to be in good standing when he becomes more than thirty days delinquent in his dues payments. If a member becomes more than sixty days, but less than six months, delinquent in the payment of dues, he will be automatically suspended from the Union and "may be removed from employment." If a member becomes six months delinquent in the payment of his membership dues, he "may be expelled."

In October, 1976, Union President Robert Dean and Union Financial Secretary Ralph Rucker became aware that certain Union members were delinquent in the payment of their dues. Among these delinquent members were Hall and Bahar. In an effort to collect these delinquent dues payments, notices were placed on bulletin boards at seven locations throughout the distillery listing the names of the delinquent members. The notices indicated that **immediate** payment of dues was necessary. On November 3, 1976, Bahar, who had been laid off from late July until October, responded to the posted notices by making a partial payment of his dues arrearage. At that time, Secretary Rucker told Bahar that he was still $24.00 behind in the payment of his dues. Bahar promised to pay this arrearage promptly. Bahar was laid off again at about the time this promise was made.

After a period of time during which Bahar made no further dues payments, President Dean informed Bahar that he was six months delinquent in the payment of his dues and that his "card would be pulled" unless his dues were paid immediately. The record indicates that Schenley's employees knew that when an employee's "card is pulled," that employee is terminated.

Bahar was aware of the consequences of becoming delinquent in the payment of his union dues because he had previously discussed the matter with President Dean. At that time, Dean explained the significance of the dues delinquency lists that were posted throughout the plant and informed Bahar that a failure to pay union dues would result in his being "laid off." Bahar testified before the Administrative Law Judge that he understood this to mean that he would be terminated.

Bahar, who chose not to obtain an "out-of-work card" upon being laid off by the Company, has admitted throughout these proceedings that he knew that his dues obligations to the Union continued throughout the period of his layoff.

Charging Party Hall, who had been laid off since April, did not respond to the notices posted throughout the plant in October, 1976. As a result, in November, 1976, President Dean telephoned Hall and advised him that he was six months behind in the payment of his Union dues. President Dean told Hall that the Union did not like to terminate employees, and therefore, it would be necesary for Hall to pay at least three months of the arrearage immediately.

At about the same time, Secretary Rucker telephoned Hall and informed him that he owed $24.00 in unpaid Union dues. Hall told Secretary Rucker that he would pay his dues arrearage as soon as he got his next unemployment insurance benefits check. This promise was not kept.

Like Bahar, Hall has admitted throughout these proceedings that he was fully aware of his continuing obligation to pay Union dues while laid off from work.

Hall, also like Bahar, chose not to obtain an "out-of-work card" from the Union while he was on layoff.

In December, 1976, Hall received a check from the Company for vacation pay due him. Union membership dues were deducted from this check and, in accordance with established Union practice, credited prospectively to cover membership dues for the months of January and February, 1977. Even with these payments, Hall remained six months in arrears in the payment of his membership dues.

Secretary Recker telephoned Hall again in December and reminded him of his delinquency in membership dues. Hall was advised that unless his $24.00 arrearage was paid immediately, his "card would be pulled." Hall testified before the Board's Administrative Law Judge that he understood the phrase "to pull a card" to mean that one's employment is terminated.

In January, 1977, Bahar, who was still on layoff, visited the plant and spoke with the Company's Industrial Relations Manager on an unrelated matter. At this meeting, Bahar asked about his dues arrearage and was instructed to consult with President Dean. Bahar did not comply with the Industrial Relations Manager's suggestion.

Neither Hall nor Bahar made any further dues payments to the Union. Therefore, on March 22, 1977, the Union sent a letter to the Company requesting that Hall be discharged pursuant to the union security provisions of the contract. On April 4, 1977, the Union sent a second letter to the Company making a similar request with regard to Bahar. The Company complied with the Union's requests, but apparently did not notify either Hall or Bahar of their termination.

Hall was reinstated to his former job in October, 1977, upon payment of his existing dues arrearage. Bahar was reinstated in November, 1977, after tendering his back dues.

Unfair labor practice charges were filed by Hall and Bahar with the National Labor Relations Board ("the Board") which resulted in the issuance of a "Consolidated Amended Complaint" on November 30, 1977. Evidence was presented before Administrative Law Judge David S. Davidson on April 24, 1978. The Administrative Law Judge rendered a decision on August 28, 1978, finding that the Union violated 29 USC §§158(b)(1)(A) and 158(b)(2) in requesting the Company to terminate the employment of Hall and Bahar. On May 18, 1979, the National Labor Relations Board, Member Murphy dissenting, rendered a Decision and Order affirming the Administrative Law Judge's decision. The Board's Decision and Order required the Union to cease and desist from engaging in the unfair labor practices with which it was charged, post customary notices, and compensate Hall and Bahar for any monetary losses suffered as a consequence of the Union's alleged unfair labor practices.

In July, 1979, pursuant to the provisions of 29 USC §160(e), the Board petitioned the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") for enforcement of the Board's Decision and Order of May 18, 1979. An Order enforcing that Decision and Order was entered by the Court of Appeals on February 16, 1981.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. This Case Presents A Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

The scope of a union's fiduciary duty to its members in the enforcement of union security agreements has never been considered by this Court. In this case, the Board and the Court of Appeals have imposed unprecendented fiduciary burdens upon the Union that far exceed those imposed by any prior decision rendered by the federal courts of appeals. This Court's consideration of this issue is necessary in order to (1) resolve the ambiguity concerning the extent of a union's responsibility in enforcing the lawful membership dues obligations of its members and (2) to avoid the injustice resulting from the imposition of unduly harsh burdens upon the Petitioning Union that are not supported by existing precedent.

A. A Union's Fiduciary Duties

Prior to the decisions rendered in this case by the Board and the Court of Appeals, the extent of a union's duty to its members in enforcing the members' obligation to pay union dues was well established by a number of federal court decisions. The Board's departure from these established standards, and the Court of Appeal's affirmation of that departure, creates the ambiguity that requires the attention of this Court.

The first federal court decision bearing upon this issue was rendered in **International Union of Electrical, Radio and Machine Workers v. National Labor Relations Board**, 307 F.2d 697 (D.C. Cir.

1962). That case involved a situation in which a union member was discharged for failing to " 'spell out' that $5 of the sum [tendered to the union in payment of dues] was for the initiation fee." **Id.** at 682. The union refused to accept the tendered payment without explanation, and then caused the member's employer to terminate his employment on the ground that the initiation fee was unpaid. The court enforced the Board's order against the union with these words:

> "Out of hand rejection of the money order, without a word of explanation, amounts in our view to an arbitrary failure on the Union's part to meet its obligations and peculiar responsibilities under the Act." **Id.** at 684.

The theory behind the ruling in **International Union of Electrical, Radio and Machine Workers** was succinctly stated in a decision rendered the following year. In **NLRB v. Hotel, Motel and Club Employee's Union, Local 568**, 320 F.2d 254 (3rd Cir. 1963), two employees failed to initiate their membership in a union as required by the terms of the union security clause binding the union and their employer. Although the two employees made repeated attempts to comply with the union's procedures for joining, inefficiencies in the union bureaucracy resulted in their failing to join by the required date. As a result, the union requested that the employer discharge the delinquent employees. The Court, in enforcing a Board order, stated the duties that a union assumes in making such request of an employer:

> "The comprehensive authority vested in the union, as the exclusive agent of the employees, leads inevitably to employee dependence on the

labor organization. There necessarily arises out of this dependence a fiduciary duty that the Union deal fairly with the employees . . . . At the minimum, this duty requires that the union inform the employee of his obligations in order that the employee might take whatever action is necessary to protect his job tenure . . . . The union may not evade this duty, as the Local did here, and then demand dismissal of the employee when he becomes delinquent in the payment of his dues." **Id.** at 258.

Subsequent decisions of the federal courts of appeal have further defined the Union's obligations to its members in this regard.

In **NLRB v. Teamsters, Local 182,** 402 F.2d 509 (2nd Cir. 1968), the union sought the termination of an employee who had been allowed to work for two years without joining the union. During that period, a union security clause was placed into effect for the first time. The terminated employee was given no notice of the newly-implemented union security provision. Ten months later, completely without warning, the employee was terminated. The Court ruled that the union "was required at a minimum to tell James [the terminated employee] that under the new contract it would no longer tolerate his non-membership and failure to pay dues." **Id.** at 510.

In **H. C. MaCauley Foundry Company v. NLRB,** 553 F.2d 1198 (9th Cir. 1977), it was determined that an ambiguous notice of a member's dues obligation did not satisfy a union's fiduciary duty. In that case, the charging party took a leave of absence in order to recover from injuries sustained while on the job. While

he was on medical leave, he failed to pay union dues. When the union discovered his delinquency, it sent him a notice stating that unless he paid his dues on the first pay day, his employment would be terminated. The charging party interpreted the notice to mean that he would be required to pay his dues on the first pay day after his return from medical leave. The union, however, sought the termination of the charging party on the next pay day after he received the notice.

The Board, whose order was enforced, ruled that the charging party had reasonably concluded that the deadline for payment was the first pay day after his return to work, rather than the first day after receipt of the letter. It was held that the union must bear the responsibility for the ambiguity of the notice.

Similarly, in **Teamsters, Local 162 v. NLRB**, 568 F.2d 665 (9th Cir. 1978), a union attempted to compel an employer to terminate employees who had been hired as replacements for striking union members, but who had failed to join the union as required by the collective bargaining agreement. Notices sent to the strikers' replacements, advising them of the necessity of joining the union, were never delivered. The Court held that this failure to deliver the notices justified the employer's refusal to terminate the replacement employees.

The most recent case bearing upon this issue is **National Labor Relations Board v. Construction and Building Material Teamsters, Local 291**, 633 F.2d 1295 (9th Cir. 1980). There, due to serious personal problems of which the court took special note, a union member inadvertently neglected to make dues payments for the months of April, May and June, 1976.

On July 1, 1976, the member tendered a dues payment to the union to cover the months of July, August and September. On the same day, he was sent a notice by the union informing him of his delinquency in the payment of dues and advising that it had requested that his employer terminate his employment. He immediately went to the union office and requested that his payment for the months of July, August and September be credited to the period of his delinquency. Both that request, and a request that the union waive the automatic suspension from membership resulting from his three-month delinquency, were denied. As a consequence, the employee was terminated.

Noting that the record indicated the union had granted requests similar to that made by the charging party on thirty-two occasions in the eight years preceding the charging party's termination, the Court held:

> "Before a union takes the drastic step of causing a member to be discharged from his employment for delinquent dues payments, the union must take whatever steps are necessary to be certain that the delinquency was not due to the member's ignorance or inadvertence." **Id.** at 1299.

In each of these cases, unions were held to have violated fiduciary responsibilities to their members in seeking their discharge for non-payment of dues. But in **every** case, either (1) the union member sought, in good faith, to comply with the duties imposed upon him by virtue of his union membership, only to have his efforts thwarted by the union's actions, or (2) the union totally failed to give its member any notice of his

dues obligation prior to seeking his discharge. Neither of these circumstances exists in the instant case.

B. The Union Fulfilled Its Fiduciary Duties to Hall and Bahar.

The Union fulfilled its fiduciary duty to Hall and Bahar by (1) providing them with copies of the collective bargaining agreement binding the Company and the Union and copies of the Union's constitution and by-laws, (2) conspicuously posting notices of their delinquency in areas throughout the plant, and (3) personally contacting them by telephone.

The Board found that both Hall and Bahar were provided with copies of the collective bargaining agreement between the Union and the Company, and copies of the Union's constitution and by-laws at the time they became Union members. It is undisputed that the collective bargaining agreement contains a valid union security provision requiring all Company employees to "be and remain members of the Union in good standing . . . **as a condition of employment** . . . ." (Emphasis added). The agreement further provides that "[t]he Company shall be required to discharge any employee upon notification of the Union to the effect that said employee is not in good standing." The Union's constitution specifies the requirements that must be met in order to maintain "good standing" in the Union.

These documents make clear a Union member's obligation to pay dues, and the likelihood that dismissal will result from enforcement of the union security clause against members failing to meet that obligation. This is the first means by which the Union

fulfilled its fiduciary duty to inform Hall and Bahar of their obligations and the consequences of failing to meet them.

Upon receiving word that Hall and Bahar were delinquent in their dues payments, Union Financial Secretary Rucker placed their names on delinquency lists and conspicuously posted the lists on bulletin boards at seven locations throughout the distillery. These notices stated that immediate payment of dues was necessary. This was the second means by which the Union fulfilled its obligation to Hall and Bahar.

The third means by which the Union satisfied its obligation to Hall and Bahar was through personal contact by the Union's officers. President Dean and Secretary Rucker talked to Hall on three occasions, and Bahar twice, and advised them that immediate payment of their dues arrearages was essential. Both men were advised that failure to meet their dues obligations would result in the termination of their employment.

The Union submits that the distribution of documents, the posting of the names of delinquent Union members, and the conversations between Union officers and Hall and Bahar, satisfied its fiduciary duty to them. Under the **Hotel Employees** rule, the Union had to inform Hall and Bahar of their obligation so as to allow them to take whatever action was necessary to protect their job tenure. Under the decision in **NLRB v. Construction and Building Material Teamsters Local 291, supra**, the Union was duty-bound to make certain that the delinquencies of Hall and Bahar were not due to their "ignorance or inadvertance." Under the facts found to exist by the Board, the Union's efforts meet both of these tests.

Had Hall and Bahar fulfilled their promises to make the payments requested of them by the Union, their positions with the Company would have been preserved. Because they did not, the Union was within its statutory and contractual rights in requesting their discharge.

The Union's position in this regard is supported by a number of decisions of the National Labor Relations Board.

In **United Brotherhood of Carpenters (Alcoa Construction Systems, Inc.)**, 224 NLRB 1034 (1976), a large number of construction workers were laid off from their jobs during the year 1974. Under the provisions of the applicable collective bargaining agreement, all were required to maintain good standing with the union throughout the layoff by continuing to pay union dues. Of the 100 laid-off workers, only four failed to maintain their good standing, including employee Igou. When the employer recalled the laid-off workers in 1976, it did not recall Igou because he had not fulfilled his dues obligation.

The union contended that it had fulfilled its obligation to the charging party by sending two notices of his dues arrearage to the home address that he had previously given the union. Igou had moved to a new residence prior to the mailing of these notices and, as a consequence, had not received any notice of his dues delinquency.

After the union in **Alcoa** learned of the massive layoff at the plant, it conducted a meeting of the affected members at which they were advised what actions were necessary to protect their jobs. They were

advised that it was up to them to pay union dues and insurance premiums directly to the union while laid off. Igou was on vacation at the time of the meeting and did not attend.

Despite this testimony tending to show that Igou was never actually advised of his obligation to continue to pay his dues during the layoff, the Board held that the union had fulfilled its duty. The Board reasoned as follows:

> "[T] here is evidence, which I find convincing, that the union distributed copies of the collective bargaining agreement which made dues payments a condition of employment and that Igou was given one as was everybody else. He also knew his dues were checked off his pay throughout the year that he worked.
>
> Close to 100 people paid continuing dues while out of work, some for seven months, the rest for eleven months. What are the probabilities that they would do this only to be members of the union, and not for any reason connected with their jobs? This local is limited to this one plant; it is not a possible avenue for referrral to other employment. It must be found that this large group knew that payments were necessary for recall the day Alcoa might reopen the plant. Tyrone is a small town where 100 people out of work is a large segment. Igou talked to the people.

. . .

> The rest is a matter of reasoning. Would he have sat for two months and done nothing about a notice that told him he was terminated for losing union membership if he had not known, before receiving it, and before knowingly permitting his membership to lapse, that this is exactly what was going to happen? I think not." **Id.** at 1037.

The situation in **Alcoa** is remarkably similar to that in the present case. Both Hall and Bahar received copies of the collective bargaining agreement between the Union and the Company and a copy of the Union's constitution and by-laws at the time of their initiation. The agreement and the constitution make it clear that a member's failure to maintain his dues payments would result in his termination from employment.

Also, as was the case in **Alcoa**, neither Hall nor Bahar contacted the Union or the Company in an effort to determine the reasons for their discharge after learning of their termination. To parrot the words of the Board in its **Alcoa** decision: Would Hall and Bahar have done nothing after being advised of their discharge unless they had known that discharge was the consequence of their failure to pay Union dues? The Union submits that they would not have done so and that they, in fact, did not take immediate action after learning of their termination because they knew of their obligations, knew they had not fulfilled them, and expected to be terminated.

Also supporting the Union's position is **John J. Roche & Co.**, NLRB 1082 (1977), **enf'd, sub nom, Larkins v. NLRB**, 596 F.2d 240 (7th Cir. 1979). There, a union sought to discharge one of its members for fail

ing to pay dues during a period of suspension. In that case, the Board held simply that:

> "The right to request the discharge of a union member is accompanied by an obligation to afford that member an opportunity to satisfy his indebtedness before any attempt is made to effectuate his discharge." 231 NLRB at 1082.

It was held that the union fulfilled its obligation to the discharged employee because he had been a member of the union since 1969 "and was fully aware of his general dues obligations as well as the possibility of suspension from the union and discharge from employment for the failure to pay dues." **Id.** at 1082. In this case, both Hall and Bahar have admitted that they were aware of their continuing dues obligation during layoff.

The Board in **Roche** also considered the fact that the names of the members who were delinquent in the payment of dues were posted throughout the shop and that the discharged employee's name had appeared on these lists. It was held that these lists were adequate notice of his delinquency even though he testified that he did not think that the lists applied to him. Likewise, the names of Hall and Bahar were placed on delinquency lists posted throughout their work place.

In **United Auto Workers, Local 17 (Kuhlman Electric Company)**, 210 NLRB 798 (1974), a newly-hired employee refused to join the union within ninety days of his hire and was consequently discharged. The Board's General Counsel contended that the union had inadequately advised him of his obligations and the actions necessary to protect his job. The Board rejected

this contention because union officials had warned the employee of the ninety-day requirement and because he had admitted that he was aware of the requirement contained in the collective bargaining agreement. The union had provided him with a copy of the contract.

Verbal notice, together with the fact that the employee had been provided with a copy of the applicable contract, was held sufficient to meet the union's duty. The Board held that such notice, when considered together with the educational background of the employee, sufficed to constitute adequate notice of the actions necessary to protect his job.

In the present case, both Hall and Bahar were presented with copies of the collective bargaining agreement and constitution of the Union. Also, both Hall and Bahar had some college education. Because Hall and Bahar were presented with documents outlining their dues obligations, were verbally warned by Union officials that they were delinquent and would be terminated if their dues were not paid immediately, and were members of considerable education, the Union met its fiduciary duties under the rule of **Kuhlman Electric Company.**

Board decisions cited by the Board's General Counsel in the Court of Appeals are distinguishable from the present fact situation. Those cases involved situations in which (1) a union member's efforts to meet his obligations to the union were thwarted by the union's actions, or (2) the union totally failed to give its member notice of his dues obligation.

In **Teamsters, Local 122**, 203 NLRB 1041 (1973), the charging parties were notified by letter, in 1971,

that they were three months behind in paying their union dues and would be discharged from employment unless the arrearages were paid within one week, together with a $250.00 "reinitiation fee." The amount of the delinquency was not stated. Prior to receiving the letter, none of the charging parties had ever been informed by the union that they were delinquent in payment of their dues.

The delinquencies had been discovered by the union only after an audit of the books had revealed that the charging parties had failed to make dues payments for certain months in 1968 and 1969, two to three years earlier. Subsequent dues payments were back-credited to the months in which the arrearages appeared, thereby making each of the members currently delinquent in the payment of dues. Payments tendered without an accompanying "reinitiation fee" were refused by the union and the delinquent members were terminated.

In the present case, the Union has not acted to obstruct or hinder Hall or Bahar in paying the dues obligations that they have admitted to exist.

In **Bay Area Typographical Union (Northwest Publications, Inc.)**, 218 NLRB 812 (1975), another Board decision relied upon by the General Counsel in the court below, three employees were discharged as a result of their delinquency in payment of union dues. The three employees were two, three and four months delinquent, respectively. Under the terms of the applicable collective agreement, the union was justified in seeking the termination of employees who were four months delinquent in the payment of dues.

These facts show that the union had not, itself, determined the proper standard for determining whether a particular member was in good standing. This was evidenced by the fact that the three employees discharged were from two to four months delinquent in payment of dues. The apparent conflict between the wording of the governing documents of the union, and the actual enforcement practice, created an ambiguity which resulted in the employees not receiving sufficient notice to allow them to take action to protect their employment. Consequently, the union was found to have violated the Act. In the present case, no ambiguity exists as to the standard for maintaining good standing. The fact that the Union was more lenient with Hall and Bahar than was required by the terms of its constitution serves as no ground for finding a violation of the Act.

In **Conductron Corporation**, 183 NLRB 419 (1970), an employee failed to pay union dues while on layoff. In accordance with the union constitution, the employee was expelled from union membership when his delinquency had extended to three months. Contrary to the usual practice, however, the employee was not notified that his union membership had been terminated.

When the employer recalled the employee from the layoff, the employee inquired of his shop steward as to his obligations to the union. The steward promised to check with the union business agent and advise the employee. The employee never received a reply to his query. Three weeks later, without notice, the employee was terminated for non-payment of dues.

The Board in **Conductron** found that, since the provisions of the union constitution were ambiguous in setting forth the employee's obligation to continue to pay dues during periods of layoff, and because the union failed to respond to the employee's inquiry, the union violated the Act causing the employee's termination.

Similarly, in **Industrial Union of Operating Engineers, Local 545**, 161 NLRB 1114 (1966), an employee was rehired two years after quitting his original job and allowing his union membership to lapse. Upon being rehired, the employee determined from the union the steps that he would have to take in order to regain his good standing with the union. Additionally, the employee secured the employer's promise to pay all back dues and reinstatement fees necessary for the employee to regain the good standing that he had lost as a result of his having previously allowed his union membership to lapse. The union did not inform the employee that he would also have to pay an initiation fee and current dues, within eight days of his rehire, in order to preserve his new employment. When the employee did not pay the initiation fee and current dues, the union caused the employer to discharge him. The Board held that the union's failure to notify the employee of his obligations upon rehire, as opposed to the duties resulting from his having allowed his membership to lapse two years earlier, gave rise to a violation of the Act when the union requested his termination.

In each of these cases, unions were found to have violated the Act only when they **affirmatively** acted in such a way as to thwart a member's attempts to meet the obligations of his membership. Such is not the

case in this situation. Hall and Bahar were given ample opportunity to fulfill their dues obligations. Upon this basis, the cases relied upon by the Board are distinguishable.

The foregoing analysis of all prior precedents bearing upon the issues raised in this action indicate that there is no authority supporting the conclusion drawn by the Court of Appeals that "the union failed to give clear and unambiuous notices to the two members that continued failure to pay dues . . . would result in expulsion from the union and discharge from employment." The Union's efforts in this regard are in strict compliance with the standards set forth in **NLRB v. Hotel, Motel and Club Employees Union, Local 588, supra,** and **National Labor Relations Board v. Construction and Building Material Teamsters Local 291, supra.** The Union's efforts were totally unlike those of the unions found to have violated the Act in the decisions relied upon by the Board. Under such circumstances, this Court should grant the Union's Petition for Writ of Certiorari in order to prevent a conflict that will arise between the decision rendered by the Court of Appeals in this case and the prior decisions rendered by other courts of appeals on this issue.

2. The Board Has Departed From Established Precedent In Permitting Hall and Bahar To Purposefully Avoid Their Legitimate Dues Obligations.

Even if the Union had failed to satisfy all the technical requirements for notifying Hall and Bahar of their dues delinquencies and the consequences thereof, the Complaint issued by the Board against the Union should have been dismissed. **Hall and Bahar**

have admitted that they knew their obligation to pay dues continued throughout the period of their layoff. They were each presented with a number of opportunities to pay those dues or to discuss their financial situation with union representatives and make arrangements for future payments. **Both men promised to take immediate action to pay their dues.**

Despite these opportunities and promises, however, neither Hall nor Bahar made any attempt to discuss his delinquencies with Union officials or make partial payments on those arrearages when they were advised that such payments would be acceptable. Both reneged on their promises to make prompt payment. It is clear that both men were purposefully avoiding payment of obligations that they knew to exist. Under established Board precedent, Union members are not permitted to use the fiduciary responsibilities of their Union as a means of avoiding their lawful dues obligations.

In **John J. Roche & Co., Inc.** 231 NLRB 1082 (1977), **enf'd sub nom, Larkins v. NLRB**, 596 F.2d 240 (7th Cir. 1979), the Board was faced with just this situation. It was held that the responsibilities of a union to its members "were never intended to set as a shield for those who seek to avoid their legitimate dues obligations." 231 NLRB at 1083.

A similar holding was adopted by the Board in **Teamsters, Local 630 (Ralph's Grocery Company)**, 209 NLRB 117 (1974). In that case, a member of one local union failed to comply with the union's rules governing transfer to a second local, upon being hired by an employer whose employees were represented by the second local union. Because the employee did not

comply with these union rules, he was not made aware of his financial obligations to the second union and was terminated under the provisions of a union security agreement.

The Board ruled the "the plight in which he [the discharged employee] found himself was due as much to his failure to abide by his union membership obligations as the union's neglect in notifying him of his union security obligations." **Id.** at 125. The Board concluded that he had engaged in a calculated attempt to avoid his dues obligations. The Board held:

> "It must be assumed, however, that the policy of the Board was never intended to be so rigidly applied as to permit a recalcitrant employee to profit from his own dereliction in complying with his obligations as a union member on withdrawal status, or under circumstances such as those presented here. . . . [T] he protection of Section 8(b)(2) was never intended to be extended to 'free riders'. . . ." **Id.** at 124-125.

Accordingly, it was held that when a union member purposefully intends to evade his dues obligations, a union's fiduciary duties to that member will not protect him from the consequences of his willful act. The union will not be required to meet the standards that ordinarily apply when a union security clause is used to terminate one of its members.

In the present situation, the record shows clearly that Hall and Bahar purposefully sought to avoid their dues obligations during their period of layoff. Under these circumstances, the decisions in **Roche, supra,** and **Ralph's Grocery, supra,** justify the Union's action in seeking their termination.

3. The Duties Imposed Upon The Union By The Board's Decision Are Unduly Burdensome.

The Decision and Order issued by the Board in this case imposes stringent requirements upon the Union that are not supported by either the terms of the Act or existing precedent. In creating these requirements, and simultaneously finding that the Union failed to meet them, the Board has subjected the Union to an unfairness that this Court should remedy. But, of equal significance is the prospective effect of the Board's Decision and Order upon the operations of this Union and thousands of others like it.

This Union is a small one. It has only about 220 members. It has no full-time officers or staff. To impose rigid notice requirements upon it and other unions of similar size and resources creates an undue burden that does not really further the goals that the Act is intended to promote.

The decisions rendered in cases such as **NLRB v. Hotel, Motel and Club Employees' Union, Local 568, supra,** and **NLRB v. Construction and Building Material Teamsters Local No. 291, supra,** adequately set forth the general principles to which a union must adhere in order to insure that its members are fairly treated in regard to the enforcement of dues obligations. To go beyond these statements of policy and promulgate technical requirements of notice, as the Board has done in this case, imposes an unwarranted burden upon unions that lack the resources necessary to fulfill such requirements. To use the words employed by Member Murphy in her dissenting opinion, the Board has

adopted a "hyptertechnical and mechanistic approach . . . [that] places an unreasonable burden on unions seeking lawfully to require members to fulfill their membership obligations." Appendix at 12a. This Court should not allow the Board to apply the provisions of the Act in such a needlessly restrictive manner. The sufficiency of a union's actions in fufilling its fiduciary duties to its members should continue to be governed by the circumstances existing in each individual case.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
SEGAL, ISENBERG, SALES & STEWART

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COUNSEL FOR DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION OF AMERICA LOCAL UNION 38, AFL-CIO

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Petition For A Writ Of Certiorari was mailed, postage prepaid, to Elliott Moore, William Wachter and Ruah Donnelly Lahey, Office of the General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570, on this _____ day of May, 1981.

COUNSEL FOR DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION OF AMERICA, LOCAL UNION 38, AFL-CIO

APPENDIX

No. 79-1379

United States Court of Appeals for the Sixth Circuit

NATIONAL LABOR RELATIONS BOARD,

- Petitioner

versus

DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION OF AMERICA, LOCAL UNION 38, AFL-CIO,

- Respondent

BEFORE: LIVELY and MARTIN, Circuit Judges; and BERTELSMAN*, District Judge.

This matter is before the court on application of the National Labor Relations Board for enforcement of its decision and order finding the respondent union in violation of Sections 8(b)(2) and (1)(A) of the National Labor Relations Act. The violation found by the Board was a breach of the union's fiduciary duty in expelling two members for dues delinquency without first giving them clear and unambiguous notice of their dues obligations and of the consequences of failing to meet these obligations. Under a union security provision this action resulted in discharge by the employer. The decision and order are reported at 242 NLRB No.51.

The only issue in the case is whether substantial evidence in the record as a whole supports the finding by the administrative law judge of a violation, affirmed by the Board with one member dissenting. The union

argues that the Board misstated the case in asserting that the administrative law judge found that the union had permitted other employees to become more than six months delinquent without causing their discharge. It is clear from the record that the union had not strictly enforced the requirement for payment of dues set forth in its constitution though the earlier cases concerned del'nquency of less than six months. This error in the Board's decision is not dispositive of the case, however. Though the union made some effort to inform the two members of their dues delinquency and of the necessity for bringing their dues payments up to date, there is substantial evidence in the record to support the finding both of the ALJ and the Board that the union failed to give clear and unambiguous notices to the two members that continued failure to pay the dues in arrears and maintain dues payments currently would result in expulsion from the union and discharge from employment.

Accordingly, the application for enforcement of the decision and order of the Board is granted.

ENTERED BY ORDER OF THE COURT

Clerk

*The Honorable William O. Bertelsman, Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

242 NLRB No. 51

PMT
D-5045
Frankfort, Ky.

United States of America Before the National Labor Relations Board

DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS' INTERNATIONAL UNION OF AMERICA, LOCAL UNION 38, AFL-CIO
(Schenley Distillers, Inc.)

versus

GRANT H. HALL, an Individual

Case 9—CB—3607

MORGAN A. BAHAR, an Individual

Case 9—CB—3680

DECISION AND ORDER

On August 28, 1978, Administrative Law Judge David S. Davidson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

We agree with the Administrative Law Judge that Respondent violated Section 8(b)(2) and (1)(A) of the Act by causing the discharge of Hall and Bahar for failure to pay dues, without giving Hall and Bahar clear and unambiguous notice of its intention to do so.

Respondent and Schenley Distillers, Inc. (Schenley), have a collective-bargaining agreement which contains a valid union-security provision. That provision requires, **inter alia,** that employees must remain members in good standing or, upon union notification to Schenley that they are not in good standing, employees will be discharged. The contract also states that employees must pay dues as established by Respondent to be in good standing. Respondent's constitution and bylaws state that: (1) a member more than 30 days in arrears on dues payment no longer maintains his/her good standing; (2) a member more than 60 days, but less than 6 months, in arrears automatically will be suspended and **may** be removed from employment; and (3) members more than 6 months in arrears

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. **Standard Dry Wall Products, Inc.**, 91 NLRB 554 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

may be expelled. All employees receive copies of the contract and of Respondent's constitution and bylaws upon being sworn into union membership.

Grant Hall was hired by Schenley in September 1975. He was on medical leave from April to September 1976. Although able to work by September, Hall was then laid off. As of November 1976, Hall was 6 months in arrears on his dues payments.[2] Hall had been in layoff status before and his practice had been to pay his dues arrearages when he returned to work. Dean, Respondent's president, called Hall, informed him of his arrearages, told him that he did not like to terminate employees, and that, if Hall could pay at least half of his arrearages, the rest could wait. Also in late November, Rucker, Respondent's financial secretary, called Hall and informed him of his dues arrearages. In December 1976, Hall received a check for vacation benefits from which dues were deducted; however, those dues were credited prospectively by Respondent, i.e., for January and February, thus leaving Hall still 6 months in arrears on his dues delinquencies. There were no further communications between Respondent and Hall, and on March 22, 1977, Respondent sent a letter to Schenley requesting that Hall be discharged pursuant to the union-security provision of the contract.

Morgan Bahar was hired in January 1976 and laid off at the end of July 1976. Bahar was not on checkoff and did not pay any dues at the beginning of his employment. His name appeared on the October delinquency

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[2] Respondent required members in layoff status to pay only half their dues.

list which, as usual, Respondent posted at the plant. In November Bahar paid $20 of his arrearages to Rucker. Also in November Dean called Bahar and stated that, since Bahar was 6 months in arrears, his "card would be pulled" unless his dues were paid. In January 1977, Bahar visited Schenley and spoke with Industrial Relations Manager Burch. Bahar asked about his dues and was told by Burch to see Dean; however, Bahar merely left the plant. On April 1, 1977, Respondent sent a letter to Schenley requesting that Bahar be discharged pursuant to the union-security provision involved herein.

Based on the foregoing and the record as a whole, we conclude, contrary to our dissenting colleague, that Respondent failed to fulfill its fiduciary duty to inform Hall and Bahar of their obligations under the union-security provision of the contract before requesting and securing their discharge. The Board has long held that, because of the finality of a recommendation of discharge, a union must specifically advise a member of the obligations under the union-security agreement before effectuating a discharge. A union's duties include informing the member of the amount owed, the method used to compute that amount, when such payments are to be made, and that discharge will result from failure to pay.[3]

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[3] See **Philadelphia Sheraton Corporation**, 136 NLRB 888 (1962), enfd. 320 F.2d 264 (3d Cir. 1963); **District 9, International Association of Machinists and Aerospace Workers, AFL-CIO (Marvel-Schebzer, Division of Borg-Warner Corp.)**, 237 NLRB No. 207 (1978); **International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, Local Lodge No. 732, AFL-CIO (Triple A Machine Shop, Inc., d/b/a/ Triple A South)**, 239 NLRB No. 69 (1978).

We are not persuaded in the instant case that Respondent provided to the discriminatees clear and unambiguous notice of their dues deliquencies, the manner of their computation, or the consequences which would follow if the arrearages were not paid by a certain date. Thus, even though Respondent's president and financial secretary made calls to both Hall and Bahar, at no time did Respondent inform them of a due date for the payment of arrearages or that termination would follow immediately upon failure to pay.

Further, analysis of the collective-bargaining agreement and Respondent's constitution and bylaws, and the provisions therein which pertain to discharge for members not in good standing, reveals that those provisions do not **require** discharge, and thus in themselves would not provide sufficient notice of the consequences of failure to pay dues arrearages. Respondent's constitution and bylaws, article X, section 1, state that a member "sixty days or more but less than six months in arrears in the payments of dues . . . shall stand automatically suspended . . . [and] **may** be: (a) Removed from employment . . . ." (Emphasis supplied.) In addition to this ambiguity regarding **possible** discharge for dues arrearages, article X, section 2, merely provides that "[m]embers six months in arrears of payment of dues . . . may be expelled." This section does not even mention the possibility of removal from employment for being 6 months in arrears, and yet that was the alleged status of Hall and Bahar. Thus, even though the discriminatees may have received copies of the constitution, bylaws, and collective-bargaining agreement which set forth union-security obligations, we do not believe the provisions therein are sufficiently unambiguous to provide adequate notice of such obligations. Even if a union member is aware generally

of the obligation under a union-security provision, a union is still required to give specific and advance notice of the arrearages, and meet the minimum level of conduct required under its fiduciary duty as described above. Thus, the fact that the discriminatees had copies of these documents and were made aware generally that they owed dues does not establish that the discriminatees were reasonably informed of their obligations **and the consequences** of their failure to meet the obligations. Moreover, as the Administrative Law Judge found, Respondent had never sought the discharge of employees situated similarly to those involved here, and therefore there could be, and was, no consistent policy of terminations for failure to pay dues arrearages which an employee could be charged with knowing. Thus, contrary to the assertions of our dissenting colleague, our conclusion that Respondent violated its fiduciary duty here is not a "hypertechnical and mechanistic approach." Rather, it is a view which incorporates the concept of fundamental fairness inherent in the Act. It is hard to imagine what is "unreasonable" in requiring a union clearly to set forth those obligations its members owe, and to provide clear and sufficient notice of the consequences for failure to meet those obligations; the obligation does not, and should not, rest on the members.[4] We

[4] The facts do show that dues were deducted from a vacation check issued to Hall; these were applied prospectively, so that Hall remained 6 months in arrears. Also, Bahar paid $20 of his arrearages to Rucker. Thus, contrary to the assertion of our dissenting colleague, it appears both Hall and Bahar took some steps toward meeting their obligations. Moreover, as noted above, it was Hall's practice to pay arrearages when he returned from layoff status, and he was given no cause to believe he would be treated differently on this occasion. In any event, even if neither discriminatee took steps to pay his arrearages, the result reached herein would not differ, since Respondent did not provide clear and unambiguous notice of the obligations owed before securing the discharges here.

therefore conclude that Respondent violated its fiduciary duty, and thus violated Section 8(b)(2) and (1)(A) of the Act, as found by the Administrative Law Judge.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Distillery, Rectifying, Wine and Allied Workers' International Union of America, Local Union 38, AFL-CIO, Frankfort, Kentucky its officers, agents, and representatives, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. May 18, 1979

_____

John A. Penello, Member

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John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MURPHY, dissenting:

Contrary to my colleagues and the Administrative Law Judge, I conclude that Respondent met its fiduciary obligation to Charging Parties Hall and Bahar prior to causing their discharge for failure to pay union dues. I would therefore find that Respondent did not violate Section 8(b)(2) and (1)(A) of the Act as alleged in the complaint.

As the Administrative Law Judge found, by November 1976,[5] Hall, who had been laid off by the Employer, was 6 months in arrears in his dues payments[6] and was so informed by Respondent's president, Dean. Dean also told Hall that Respondent did not like to terminate a member and that, if Hall would pay half the amount he owed, Respondent would wait for the rest. Also in November, Respondent's financial secretary, Rucker, called Hall and told him that he owed $24 in back dues and had to get current. In December, Hall received a vacation check from the Employer from which $8 of union dues were deducted; this amount was applied to Respondent as Hall's dues for January and February 1977. On March 22, 1977, Respondent wrote to the Employer that Hall was no longer in good standing because of his failure to pay dues and consequently the Employer did not recall Hall from layoff in the spring of 1977 when work became available.

Bahar, who was also laid off during much of that latter half of 1976, appeared on a list of delinquent members which was posted at the Employer's plant in October 1976. In November, Bahar paid $20 to Rucker, who told him at the time that he was quite delinquent and must get his dues paid, which Bahar promised to do. After paying the $20, Bahar remained more than 6 months delinquent. Also in November, Dean called Bahar and told him that he was 6 months in arrears and that unless the dues were paid his card would be pulled.

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[5] All dates herein are in the latter part of 1976 or early 1977.

[6] Employees on layoff status are required either to obtain out-of-work cards of to pay monthly dues of $4, instead of the regular dues of $8 per month.

Bahar did not attempt to communicate with Respondent regarding his dues but, in January, while visiting the Employer's industrial relations manager, Burch, about an unrelated matter, asked how much he owed the Union. Burch responded that he did not know and that Bahar should talk to an officer of Respondent, but Bahar did not do so. Subsequently, on April 1 Respondent requested the Employer to drop Bahar from the seniority list and as a result of the Employer's compliance with this request Bahar, like Hall, was not recalled by the Employer when work became available.

The Administrative Law Judge found that Bahar and Hall were given copies of Respondent's constitution and bylaws and the collective-bargaining agreement between Respondent and the Employer, and that these documents contained explicit provisions detailing employees' obligations to pay union dues and the Union's right to demand that employees be discharged for failing to meet these obligations. Additionally, as discussed above, Respondent, prior to requesting Hall's and Bahar's terminations, told them they were in arrears and were required to become current in their dues obligations but neither Hall nor Bahar attempted to pay his back dues. Indeed, neither employee even attempted to contact Respondent with regard to the arrearages.

In these circumstances, I do not believe that Respondent owed any further duty to Bahar and Hall to inform them of the consequences of their failure to pay back dues prior to advising the Employer that they were no longer members in good standing and causing them to be dropped from the Employer's seniority list. The evidence clearly establishes that Respondent, by providing them with copies of its constitution and the

applicable contract covering their employment, and by its representative's efforts to get them to pay their back dues, took reasonable steps to inform the Charging Parties of their obligations. To find in the face of these facts, as do my colleagues and the Administrative Law Judge, that Respondent failed to give Hall and Bahar sufficient notice that their jobs were in jeopardy is to take a hypertechnical and mechanistic approach, and places an unreasonable burden on unions seeking lawfully to require members to fulfill their membership obligations.

The majority argues that because the contract and Respondent's constitution and bylaws did not explicitly require discharge of employees who did not remain in good standing with the Union, Bahar and Hall can not be considered to have been put on notice of the potential result of their failure to meet their dues obligations. This argument is without merit. Although the relevant provisions afforded Respondent the right to seek discharge of employees who were in arrears in dues payments instead of imposing an obligation to demand discharges in such circumstances, this fact alone cannot be construed to suggest that Hall and Bahar were unaware of the consequences of their continuing dues arrearages.

Accordingly, I would find that Respondent did not violate Section 8(b) (1)(A) and (2) of the Act as alleged and would dismiss the complaint against the Union in its entirety.

Dated, Washington, D.C. May 18, 1979

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT cause or attempt to cause Schenley Distillers, Inc., to discriminate against Grant H. Hall or Morgan A. Bahar, or any other employee in violation of Section 8(a)(3) of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

WE WILL make Grant H. Hall and Morgan A. Bahar whole for any loss of earnings they may have suffered because of discrimination against them.

DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS' INTERNATIONAL UNION OF AMERICA, LOCAL UNION 38, AFL-CIO

(Labor Organization)

Date _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building - Room 3003, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513-684-3663.

United States of America

Before the National Labor Relations Board
Division of Judges

DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS' INTERNATIONAL UNION OF AMERICA, LOCAL UNION 38, AFL-CIO
(Schenley Distiller, Inc.)

and Case 9-CB-3607

GRANT H. HALL, An Individual

DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS' INTERNATIONAL UNION OF AMERICA, LOCAL UNION 38, AFL-CIO
(Schenley Distillers, Inc.)

and Case 9-CB-3680

MORGAN A. BAHAR, An Individual

Donald B. Hordes, Esq., of
Cincinnati, OH, for the
General Counsel.
Irwin H. Cutler, Jr., Esq., of
Louisville, KY, for
the Respondent.

DECISION

Statement of the Case

DAVID S. DAVIDSON, Administration Law Judge: The charges in these cases were filed by Grant H. Hall and Morgan A. Bahar on July 7, 1977, and September 28, 1977, respectively. On November 30, 1977, the Regional Director issued a consolidated complaint, alleging that Respondent Union caused Schenley Distillers, Inc., to discharge Hall and Bahar pursuant to a union-security agreement without giving the prior or adequate notice that they were delinquent in the payment of their periodic dues to the Union. The complaint alleges that the Union accordingly violated Section 8(b)(2) and 8(b)(1)(A) of the Act. In its answer the Union denied the commission of any unfair labor practices.

On April 24, 1978, a hearing was held before me at Frankfort, Kentucky. At the close of the hearing, oral argument was waived. The parties were given leave to file briefs which have been received from the General Counsel and the Union.

Upon the entire record in this case, including my observation of the witnesses and their demeanor while testifying, I make the following:

Findings and Conclusions

I. The Business of the Employer

Schenley, a Delaware corporation, manufactures distilled spirits at its Frankfort, Kentucky, facility. Schenley annually ships goods and materials valued in

excess of $50,000 from that facility directly to points outside the State of Kentucky. I find that Schenley is an employer engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. The Labor Organization Involved

Respondent Union is a labor organization within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts

1. The obligation of employees to pay dues.

The collective-bargaining agreement between Respondent and Schenley in effect from August 1, 1975 through July 31, 1978,[1] contained the following union-security clause:

ARTICLE II

Membership

1. (a) All present employees and those to be hired in the future, shall on the thirtieth day following the beginning of their employment, or the execution of this agreement, whichever is later, be and remain members of the Union in good standing, in accordance with the

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[1] Prior contracts also containing union-security clauses have been in effect for over 30 years.

requirements of the Labor Management Relations Act of 1947, as a condition of employment, and to the extent that such membership does not conflict with any Federal or State laws.

(b) The Company shall be required to discharge any employee upon notification of the Union to the effect that said employee is not in good standing, within the provisions of the Labor Management Relations Act of 1947.

* * * *

2. All employees subject to the terms and provisions of this Agreement shall be required to pay the initiation fee, periodic dues and regularly authorized assessments established by the Union as a condition of good standing membership.

Respondent's Constitution and By-Laws provides for a $25 initiation fee. Active employees are required to pay monthly dues of $8 payable on the first business day of the month. Laid-off employees are required to pay monthly dues of $4, unless they obtain out-of-work cards. Respondent's Constitution and By-Laws further provides:

ARTICLE IX

Good Standing

Section 1. Members more than thirty days in arrears in the payment of dues, assessments or fines shall not be in good standing. The foregoing sentence shall not be applicable to the dues obligation of a member whose dues have been withheld by his employer for payment to the Local Union pursuant to the member's voluntary authorization provided for in collective bargaining agreements between his employer and the

Local Union and/or the International Union. However, a member who is on voluntary dues authorization (checkoff) shall be under the duty to pay his dues directly to the Local Union if he has no monies owing to him by his employer which are subject to his checkoff authorization on the date when the employer deducts the dues of other members. The due date for a payment of assessments or fines shall be the date of their enactment or imposition.

* * * *

Section 3. Members thirty days and less than sixty days in arrears in the payment of current dues, assessments or fines may attend meetings but shall have neither voice nor vote thereat.

ARTICLE X

Suspension and Expulsion for Non-Payment of Dues, Assessments and Fines

Section 1. Members sixty days or more but less than six months in arrears in the payment of dues, assessments or fines shall be barred from Local Union meetings, shall be removed from committees and shall stand automatically suspended from all rights and privileges of membership.

A suspended member shall be reinstated only upon payment of full arrears and a reinstatement fee of $2.00. In addition to suspension from membership, such member may be:

(a) Removed from employment wherein an agreement between the Local Union and/or the International Union, and employer permits it; and/or
(b) Removed from any Union office without trial.

Section 2. Members six months in arrears of payment of dues, assessment or fines may be expelled.

At the time new employees report for work, Respondent conducts an orientation session in which Respondent's President Dean participates. At this session Dean ordinarily tells employees about Respondent's initiation fees, regular dues, and laid-off dues. After employees complete their probationary periods, Dean arranges to swear them in either at the next union meeting or on the job. At this time Dean customarily gives each new employee a copy of Respondent's contract with Schenley and a copy of Respondent's Constitution and By-Laws. Grant Hall and Morgan Bahar, the charging parties in this case, were both sworn in by Dean at the plant and at the time each was given copies of the contract and the Constitution and By-Laws.[2]

2. Grant Hall

Grant Hall was hired by Schenley on September 23, 1975. In April 1976 he suffered an injury off the job

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[2] Hall and Bahar testified that they were not given copies of the Constitution and By-Laws and that they received copies of the contract at their orientation sessions. A third employee Ware initially testified that when he was sworn in Dean did not give him a copy of the Constitution and By-Laws but then testified that he did not recall receiving or seeing a copy of the Constitution and By-Laws at that time. All three employees identified the documents by the colors of their covers rather than by their titles or contents and they testified either that they received or recalled receiving only one blue book. I have credited Dean that he followed his usual practice in all three cases and conclude that the three employees' contrary testimony is a product of faulty recollection of events which seemed unimportant at the time.

and was put on medical leave until September 1976. Then, although he was physically able to work, he was placed on layoff status because of lack of work. Hall had been laid off previously on five or six occasions for periods from 2 to 4 months.

Hall signed a checkoff authorization after his initial employment and except when he was on layoff or medical leave his dues were deducted from his pay. During periods of layoff before 1976. Hall permitted his laid-off dues to accumulate until he was recalled. Upon recall, he learned the amount of his arrearage through a list of delinquent members posted on the plant bulletin board and paid the accumulated arrearage to Respondent's Financial Secretary Rucker after he received his first paycheck.

By November 1976 Hall had been out of work for 6 months and was 6 months in arrears in payment of his dues. At that time, Dean obtained the telephone numbers of several delinquent employees, including Hall, from Schenley's Personnel Clerk Heady and called Hall. Dean told Hall that he was 6 months behind, that the trustees were "getting on" the financial secretary, and that his dues had to be paid. Hall replied that he had no money then but would shortly receive an unemployment compensation check after which he would come to the plant to pay him. Dean told Hall that Respondent did not like to terminate any union member and that if Hall could pay half of what he owed Respondent would wait for the remainder until later.

Shortly after Dean asked Heady for Hall's telephone number, Hall called Heady to ask about the availability of work. At the end of their conversation, Heady told

Hall that Hall should contact Dean about his union dues.[3]

In the latter part of November, Financial Secretary Rucker called Hall and told him that he owed $24 and would have to get his dues caught up. Hall replied that he was living solely on unemployment compensation but would pay his arrearage as soon as he got his next check. Rucker said nothing at that time to indicate that Hall's job was in jeopardy.[4]

In December Schenley issued a vacation check to Hall from which it deducted $8 for union dues. Respondent applied this amount as payment of Hall's laid-off dues for January and February 1977.

On March 22, 1977, Respondent wrote Schenley's industrial relations manager with respect to Hall:

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[3] Heady's testimony corroborates Dean that he sought Hall's telephone number in order to call about his dues. Although Hall denied talking to either Dean or Heady about his dues, he conceded that he was concerned about his lack of work at the time and that Heady very possibly told him that Dean wanted to see him about his dues. I have credited Dean and Heady in regard to these conversations. Although Dean and Heady were not precise as to the time of the calls, it appears that they occurred in November, when Hall was 6 months in arrears and when Hall confirmed that he spoke to Heady about the availability of work.

[4] Hall denied that Rucker called him at any time. Rucker testified he called Hall on two occasions, once in November and again in December. In an affidavit given during the investigation of this case Rucker stated that he made one call to Hall. His explanation that he was only asked about a single conversation at that time and did not volunteer that he had a second conversation is not convincing. While I have not credited Hall's denial that Dean or Rucker called him, I conclude that the second conversation described by Rucker did not occur and that Rucker called Hall only once.

> Also, we advise you to drop Grant Hall [from the seniority list] due to the fact that he is behind in his Union Dues and he has been contacted but has not paid them at this time.
>
> Therefore, he is not in good standing with the Local.

As a result, Schenley did not recall Hall in the spring of 1977 when he would otherwise have been recalled to work. Hall did not learn that he was terminated until he discovered in May that an acquaintance with less seniority had been recalled. At that time, Hall visited Schenley's Personnel Clerk Heady who told him that he had been terminated for failure to pay union dues.

In October, 1977, Hall paid his arrearages to Respondent and was reinstated by Schenley without objection from Respondent.

It is conceded that between December when $8 was withheld from Hall's pay and March when Respondent requested his discharge, Respondent had no further communication with Hall about his dues, did not notify him that he had been expelled for non-payment of dues, and did not notify him that it had requested his termination.

3. Morgan Bahar

Morgan A. Bahar was hired on January 8, 1976, and worked with some interruptions due to layoffs of short duration until July 30, 1976. Bahar was then laid off until October 1976 when he was recalled to work for several days and again laid off on October 28, 1976.

Bahar did not sign a checkoff authorization when he became a member of the Union. After either a call

from Dean of seeing his name on a delinquency list posted in the plant Bahar paid Dean his initiation fee in two installments before July 1976, but Bahar paid no dues before his July layoff. In October, Rucker posted a delinquency list in the plant on which Bahar's name appeared, and in November 1976, Bahar paid $20 to Rucker. At that time, Rucker told him that he was quite delinquent and must get his dues paid. Bahar promised that he would do so. Rucker applied Bahar's payment to his back dues for April, May, and half of June. After making this payment Bahar still owed half of his June dues and laid-off dues for 6 months.[5]

In November, Dean telephoned Bahar and told him that he was 6 months in arrears and that unless his dues were paid, his card would be pulled. Although Rucker testified that he unsuccessfully tried to telephone Bahar in November, neither he nor Dean spoke to Bahar thereafter, and the Union made no attempt to communicate with Bahar by mail.

Bahar visited Schenley's Industrial Relations Manager Burch in January 1977, about an unrelated matter. At that time, he asked Burch how much dues he owed to the Union, and Burch replied that he did not know but that Bahar should see Dean or the current Financial Secretary. Bahar did not do so, according to him, because he had no money to pay the dues.

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[5] Bahar testified that neither Dean nor Rucker spoke to him about his dues after June 1976, and that he had no recollection of paying any dues to Rucker in November. However, Respondent's dues records support Rucker's testimony as to receipt of this payment, and there is no apparent reason why these records should show a payment at that time if it was never made. I have credited Rucker and Dean rather than Bahar whose recollection appeared to be faulty in this as well as other respects.

On April 1, 1977, the Union sent Schenley's industrial relations manager a letter stating:

> Local 38 hereby advised the Company that Morgan Roberts is not in good standing with the Union because of his failure to pay past due Union dues. He has been contacted and has failed to pay as of this date.
>
> We request the Company drop him from the seniority list effective April 1, 1977.

As a result, Schenley did not recall Bahar when an opening arose in the spring of 1977. In May 1977, Bahar learned that others had been recalled, and other employees told him at that time that he had been fired for failure to pay his union dues. Bahar did not contact the Company or Respondent after receiving this information. In November 1977, Bahar was reinstated by Schenley without objection from the Union, and he paid his arrearages to the Union.

B. Concluding Findings

The General Counsel contends that the Union violated Section 8(b)(2) of the Act by failing to fulfill its fiduciary duty to inform Hall and Bahar clearly of their union-security obligations under the contract before demanding their discharges.[6]

Respondent contends that it fulfilled its obligation by posting notice of their delinquency in the plant and by

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[6] The complaint raises no issue as to the validity of the union-security clause in the agreement or as to its application to require maintenance of membership during periods of layoff.

the efforts of Dean and Rucker to contact them.

It is well settled that before a union may enforce a union-security agreement by causing the discharge of an employee, it has "a fiduciary duty . . . to deal fairly with employees," which, "at the minimum . . . requires that the union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure."[7]

The amounts owed, the basis for the computation, and the time by which payment must be made all must clearly be expressed. Responsibility for any ambiguity must be borne by the union.[8]

In this case, when Hall and Bahar were first hired, they were given specific notice that they were required to join Respondent and pay dues, and both knew that laid-off dues were required when they were on layoff. However, Hall and Bahar were not specifically informed as to how Respondent would enforce the obligation to pay laid-off dues either at that time or at any time thereafter.

Respondent's Constitution and By-Laws provides for suspension from membership after 2 months of delin-

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[7] **Hotel, Motel and Club Employees' Union, Local 568 [Philadelphia Sheraton Corp.]** v. **N.L.R.B.**, 320 F.2d 254, 258 (C.A. 3), enfg. 136 NLRB 888.

[8] **Teamsters Local Union No. 122, etc. (August A. Busch and Co.)**, 203 NLRB 1041, 1042, enf'd. 509 F.2d 1160 (C.A. 1); **Bay Area Typographical Union Local No. 21, International Typographical Union, AFL-CIO (Northwest Publications, Inc.)**, 218 NLRB 812, 814; **H. C. Macauley Foundry Co.**, 223 NLRB 815, enf'd. 553 F.2d 1198 (C.A. 9).

quency and expulsion after 6 months. They specifically authorize Respondent to seek an employee's removal from employment under the union-security clause after 2 months of delinquency. However, insofar as it appears, Respondent has never sought discharge of an employee before he was 6 months in arrears and has no consisten policy, certainly not one known or publicized to its members, as to when it seeks an employee's termination. Delinquency notices posted in the plant request immediate payment but do not indicate deadlines for payment after which discharge will be sought and are not likely to be read by employees on layoff at the time of posting.

In the case of Hall, although he had never previously been laid off for more than 6 months, his experience had been that he was permitted to pay accumulated laid-off dues after recall, and absent clear notice to the contrary it was reasonable for him to believe, as he testified, that he would again be permitted to do so. While Dean told him in November that the dues had to be paid and that Respondent did not like to terminate any members, neither he nor Rucker told Hall at that time that he would be terminated at any specific time before recall if he failed to pay his laid-off dues. Dues deducted from his vacation paycheck in December were treated as payments for future dues so that he remained 6 months in arrears on Respondent's books from December on, but Respondent did not request his termination until March. It did not contact Hall again, did not notify him of its intent to seek his termination, and did not even notify him that his termination had been requested.

In the case of Bahar, Rucker posted a delinquency notice in October when Bahar was 6 months delinquent but did not mention the possibility of termina-

tion for nonpayment of his arrearage. When Bahar paid part of his back dues in November leaving him still 6 months in arrears, Rucker told him only that he must get his dues paid without stating what would happen if he did not. Although Dean later told Bahar his card would be pulled if his dues were not paid, he gave Bahar no deadline, and Respondent then permitted 4 months to pass before pursuing the matter further. It then acted without any further notice to Bahar.

I find that however well-intentioned Dean and Rucker may have been in seeking to enforce the union-security agreement, Respondent failed to give either Hall or Bahar an unambiguous statement of Respondent's intention to seek their termination at any certain time before they were recalled to work if they failed to pay their accrued arrearages and that Respondent thereby failed to satisfy its obligation to them before seeking their discharge. Although Respondent contends that they were willful violators of their obligation to pay dues who now seek to use Respondent's fiduciary obligations as a shield to avoid their known lawful obligations, there is no indication of their unwillingness to pay based on any factor other than their unemployment, their limited financial means, and their lack of awareness of the consequences. In these circumstances, I find no basis for excusing Respondent from the obligation to given them clear notice that their jobs were in jeopardy if they waited to be recalled before paying their arrearages.[9] Accordingly, I conclude that Respondent violated Section 8(b)(2) and (1)(A) of the Act by causing Schenley to terminate them for nonpayment of dues.

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[9] **H. C. Macauley Foundry Co., supra; Bay Area Typographical Union Local No. 21, International Typographical Union, AFL-CIO (Northwest Publications, Inc.), supra.**

IV. The Remedy

Having found that Respondent violated Section 8(b)(a) and (1)(A) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall further recommend that Respondent be ordered to make Hall and Bahar whole for any loss of earnings they may have suffered as a result of the discrimination against them by payment to them of the amounts they normally would have earned from the dates of their respective discharges to the dates of their respective reinstatements, less net earnings, and interest thereon to be computed in the manner prescribed in **F. W. Woolworth Company**, 90 NLRB 289, and **Florida Steel Corporation**, 231 NLRB No. 117.[10]

Upon the basis of the above findings of fact and the entire record in this case, I make the following:

Conclusions of Law

1. Schenley Distillers, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Distillery, Rectifying, Wine and Allied Workers' International Union of America, Local 38, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By causing Schenley to discharge Hall and Bahar without first clearly informing them of their dues

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[10] See, generally, **Isis Plumbing & Heating Co.**, 138 NLRB 716 (1962).

obligations pursuant to a union-security agreement and of the consequences of their failure to meet them, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(b)(2) and (1)(A) and (2)(6) and (7) of the Act.

Upon the basis of the above findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:[11]

ORDER

Respondent Distillery, Rectifying, Wine and Allied Workers' International Union of America, Local Union 38, AFL-CIO, and its officers, representatives, and agents, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Schenley Distillers, Inc., to discriminate against any of their employees in violation of Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights are affected by an agreement requiring member-

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[11] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ship in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make Grant H. Hall and Morgan A. Bahar whole for any loss of earnings they may have suffered as a result of the discrimination against them in the manner set forth in the section of the Decision above entitled "The Remedy."

(b) Post at its offices copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by an authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Deliver to the Regional Director for Region 9 signed copies of said notice in sufficient number to be posted by Schenley Distillers, Inc., the employer will-

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[12] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ing, in all places where notices to employees are customarily posted.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 28, 1978

David S. Davidson
Administrative Law Judge

NOTICE TO MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT cause or attempt to cause SCHENLEY DISTILLERS, INC., to discriminate against Grant H. Hall or Morgan A. Bahar, or any other employee in violation of Section 8(a)(3) of the Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL make Grant H. Hall and Morgan A. Bahar whole for any loss earnings they may have suffered because of discrimination against them.

DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS' INTERNATIONAL UNION OF AMERICA, LOCAL UNION 38, AFL-CIO

(Labor Organization)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Bldg. - Rm. 3003, 550 Main Street, Cincinnati, OH 45202 (Tel. No. 513-684-3634).